SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 1210

PAUL GINSBURG,

Petitioner,

vs.

CHARLES H. SACHS, WILLIAM C. McELDOWNEY AND MAX PERLMAN

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

PAUL GINSBURG,
Counsel for Petitioner.

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Paul Ginsburg, prays that a writ of certiorari be issued to review two orders of the Supreme Court of Pennsylvania—the order refusing his Petition to Vacate Order of Non Pros and Reinstate Appeal and the order refusing his petition for reconsideration thereof.

Opinions Below

The opinion of the Court of Common Pleas of Allegheny County, Pennsylvania, reported in 91 Pittsburgh Legal Journal 217, did not deal with the question presented herein as the question was not raised in that court.

The orders of the Supreme Court of Pennsylvania refusing the petition to vacate order of non pros and reinstate appeal (R. 5) and refusing the petition for reconsideration thereof (R. 10) were not accompanied by an opinion.

Jurisdiction

The orders of the Supreme Court of Pennsylvania sought to be reviewed were entered as follows: the order refusing PETITION TO VACATE ORDER OF NON PROS AND REINSTATE APPEAL, on October 2, 1944 (R. 5) and the order refusing PETITION OF PAUL GINSBURG FOR RECONSIDERATION OF HIS PETITION TO VACATE ORDER OF NON PROS AND REINSTATE APPEAL, on March 26, 1946 (R. 10). These are final decisions of the highest court of the State in which judgment could be had. Both petitions were timely filed. The petition to vacate the order of non pros was filed within ninety days from the date of petitioner's separation from the military service (R. 9) being within the time allowed by the Soldiers' and Sailors' Civil Relief Act of 1940. As for the petition for reconsideration, the Pennsylvania Supreme Court has no Rule limiting the time within which such petitions for reconsideration, as distinguished from petitions for reargument, must be filed. The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925.

Question Presented

When an injunction decree issued by the Court of Common Pleas of Allegheny County, Pennsylvania, is pending before the Supreme Court of Pennsylvania on appeal, and your petitioner who is enjoined thereby and has a meritorious and legal defense thereto is unable to prepare and file assignments of error and briefs as required by Rule 60 of the Pennsylvania Supreme Court because of being

in the Army of the United States with the result that the court entered a judgment of non pros, did the orders of the Supreme Court of Pennsylvania refusing petition to vacate order of non pros presented within ninety days of petitioner's discharge from the military service and refusing petition for reconsideration thereof constitute a denial of petitioner's rights under the Soldiers' and Sailors' Civil Relief Act of October 17, 1940, C. 888, 54 Stat. 1178, and particularly Sections 200 (4) and 201 of said Act?

Statute Involved

The Soldiers' and Sailors' Civil Relief Act of 1940, C. 888, 54 Stat. 1178, and particularly Sections 200 (1), (4) and 201 thereof, which are as follows:

> "Section 200. (1) In any action or proceeding commenced in any court, if there shall be a default of any appearance by the defendant, the plaintiff, before entering judgment shall file in the court an affidavit setting forth facts showing that the defendant is not in military service. If unable to file such affidavit plaintiff shall in lieu thereof file an affidavit setting forth either that the defendant is in the military service or that plaintiff is not able to determine whether or not defendant is in such service. If an affidavit is not filed showing that the defendant is not in the military service, no judgment shall be entered without first securing an order of court directing such entry, and no such order shall be made if the defendant is in such service until after the court shall have appointed an attorney to represent defendant and protect his interest, and the court shall on application make such appointment. Unless it appears that the defendant is not in such service the court may require, as a condition before judgment is entered, that the plaintiff file a bond approved by the court conditioned to indemify the defendant, if in military service, against any loss or damage that he may suffer by reason of any judgment should

the judgment be thereafter set aside in whole or in part. And the court may make such other and further order or enter such judgment as in its opinion may be necessary to protect the rights of the defendant under this Act (Oct. 17, 1940, C. 888, 54 Stat. 1180).

"Section 200. (4) If any judgment shall be rendered in any action or proceeding governed by this section against any person in military service during the period of such service or within thirty days thereafter, and it appears that such person was prejudiced by reason of his military service in making his defense thereto, such judgment may, upon application, made by such person or his legal representative, not later than ninety days after the termination of such service, be opened by the court rendering the same and such defendant or his legal representative let in to defend; provided it is made to appear that the defendant has a meritorious or legal defense to the action or some part thereof. Vacating, setting aside, or reversing any judgment because of any of the provisions of this Act shall not impair any right or title acquired by any bona fide purchaser for value under such judgment (Oct. 17, 1940, C. 888, 54 Stat. 1180).

"Section 201. At any stage thereof any action or proceeding in any court in which a person in military service is involved, either as plaintiff or defendant, during the period of such service or within sixty days thereafter may, in the discretion of the court in which it is pending, on its own motion, and shall, on application to it by such person or some person on his behalf, be stayed as provided in this Act, unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service (Oct. 17, 1940, C. 888, 54 Stat. 1181)."

Statement of the Case

The petitioner, on May 28, 1943, perfected an appeal to the Supreme Court of Pennsylvania as attorney for Philip Ginsburg from the Final Decree of the Court of Common

Pleas of Allegheny County (R. 1) which enjoined Phillip Ginsburg, *his counsellors, attorneys* and agents from instituting certain criminal proceedings against Charles H. Sachs, William C. McEldowney and Max Perlman on the charges of conspiracy and criminal libel (R. 7). Said Final Decree was issued by Rowand, P. J., and McNaugher and Thompson, JJ. At that time petitioner was in the Army of the United States and on furlough in connection with said litigation. The said injunction was effective as a decree against your petitioner who was Phillip Ginsburg's counsellor and attorney throughout the proceedings (R. 8). The successful prosecution of the said appeal before the Pennsylvania Supreme Court would dissolve the injunction for your petitioner (R. 8).

On September 27, 1943, the Supreme Court of Pennsylvania convened in Pittsburgh for the term of court when the said appeal was to be ready for argument. That day your petitioner, being in Pittsburgh on emergency furlough, appeared before said court, and on notice from your petitioner Attorneys Oliver K. Eaton and Louis Caplan for the appellees were present. Petitioner then made application to the court to continue argument on the appeal to the next term of court for the reason that he was unable to secure the requisite furlough to prepare and file assignments of error and briefs and thus be ready for argument, although his need of a furlough to prosecute the appeal and to argue it had been verified by the Home Service Secretary's Department of the American Red Cross at Pittsburgh (R. 8).

Attorney Eaton opposing the continuance told the court that your petitioner had been in Pittsburgh at least five to ten times on furlough since June 16, 1943, on which day Attorneys Eaton and Caplan, refusing to stipulate on the portions of the record to be printed, had served him with written notice to take certain steps in connection with prosecuting the appeal (R. 8). Your petitioner attempted to

correct the false impression created by Mr. Eaton's misstatement by explaining to the court that since that furlough in June, 1943, he had been in Pittsburgh for just a very few days and for other purposes (R. 8). Nevertheless the question of whether or not your petitioner had had sufficient time to prosecute the appeal was confused (R. 8) and, perhaps, that is the reason why the court entered its judgment of non pros, as otherwise such judgment should not have been entered because continuances of arguments on appeal are ordinarily granted and said application for continuance was the first (R. 9). However, it is significant that all the others who likewise appeared and requested continuances that day, all of whom were civilians, had their requests granted.

Your petitioner had requested consideration for the added reason that opposing counsel had been delaying the cause for lucre and malice and had been taking unfair advantage of petitioner's being in the military service, but to no avail. In support of this reason the court was informed that when opposing counsel ought to have been in the Court of Common Pleas for the final argument of the injunction on May 3, 1943, they deliberately did not appear. Attorney Louis Caplan gave no excuse. Attorney Oliver K. Eaton sent his associate, Attorney Jason Richardson, to inform the court that he (Eaton) could not appear for argument because he was out of the city on another case. Whereupon your petitioner proved to the court immediately that Mr. Eaton was in his office across the street. Later the same morning Mr. Eaton arbitrarily informed the court from his office through Mr. Richardson that he would not appear to argue the case until the next term of court. Although petitioner called said court's attention to the policy of the Bench and Bar since Pearl Harbor of accelerating the disposition of all matters for attorneys in or about to enter

the military service, and also to the obligation of everybody to lessen the number of days away from duty for any soldier, nevertheless the Common Pleas Court would not order the final argument set. In Philadelphia, on May 17, 1943, petitioner, about to present a mandamus petition before the Pennsylvania Supreme Court to have President Judge Harry H. Rowand of the Common Pleas Court of Allegheny County commanded to set the final argument, was informed by opposing counsel that Judge Rowand at Pittsburgh had just set the argument for May 19, 1943. After the argument the court refused to hand down the Final Decree within two or three days as it had indicated it would. Hence on May 25, 1943, petitioner served notice on the court and opposing counsel that he would seek relief from the Pennsylvania Supreme Court at Harrisburg the following day. Later the same day, May 25, 1943, the Common Pleas Court handed down the Final Decree, from which the appeal was taken to the Pennsylvania Supreme Court (R. 1).

It was further submitted that the mere filing of a Bill in Equity to enjoin the institution of such criminal proceedings constituted malicious abuse of process; and also that it enabled criminal defendants maliciously to frame a case as plaintiffs against a prosecutor.

The Pennsylvania Supreme Court's order entering judgment of non pros was dated September 28, 1943. The following month petitioner was shipped overseas. Upon his return he received an Honorable Discharge from the Army of the United States dated July 14, 1944 (R. 9). Within ninety days from said date of separation from the service, to wit, on October 2, 1944, petitioner filed his sworn Petition to Vacate Order of Non Pros and Reinstate Appeal (R. 3) in which it was averred, *inter alia,* that he had been unable to prosecute the appeal because he was in the Army and unable to secure the requisite furlough to do so (R. 3-4, and 9).

Counsel for appellees elected not to file an answer to said petition, which was summarily refused on October 2, 1944 (R. 5).

Petitioner filed his petition for reconsideration of his petition to vacate order of non pros and reinstate appeal on March 23, 1946 (R. 7), on the theory that the Pennsylvania Supreme Court, when it non prossed the appeal and again when it refused the petition to vacate order of non pros, had overlooked his rights under the Soldiers' and Sailors' Civil Relief Act of 1940 (R. 10).

Thus the Federal question was fairly presented by the record, and Pennsylvania practice did not require raising the Federal question at an earlier stage of the proceedings. When petitioner filed his petition to vacate order of non pros and reinstate appeal (R. 3) he did not expect that the Pennsylvania Supreme Court would not consider the Federal law in rendering its decision. Hence petitioner raised the Federal question in his petition for reconsideration (R. 9, 10).

Counsel for appellees and respondents elected not to file an answer to the petition for reconsideration. Hence the averments of that petition, like the averments of the petition to vacate order of non pros and reinstate appeal, must be taken to be admitted. Therefore, the only question which is, and which can be, raised before your Honorable Court is whether or not petitioner has been denied his rights under the Soldiers' and Sailors' Civil Relief Act of 1940.

Regarding any consideration that may be given by your Honorable Court to the doctrine of laches in connection with the timeliness of filing the petition for reconsideration, it is respectfully submitted that counsel for appellees and respondents accepted service of the petition (R. 10) and did not raise the question, that the Pennsylvania Supreme Court in refusing the petition (R. 10) did not deal with the question, that the Pennsylvania Supreme Court has no

Rule limiting the time within which such petitions for reconsideration, as distinguished from petitions for reargument, must be filed, and that furthermore the doctrine of laches cannot be raised in this case because laches does not affect the rights of government. Laches is purely a personal matter, and has no application in a suit of a public or *quasi* public nature. The decree enjoining your petitioner in effect enjoins the Commonwealth of Pennsylvania although the Commonwealth is not a party to the proceeding. Upon the dissolution of the injunction, the prosecution would be conducted by the Commonwealth of Pennsylvania *ex rel.* Paul Ginsburg, the prosecutor, of course, being the Commonwealth.

The order of the Pennsylvania Supreme Court refusing the petition for reconsideration of the petition to vacate order of non pros and reinstate appeal was entered on March 26, 1946 (R. 10).

Specification of Errors to Be Urged

The Pennsylvania Supreme Court erred:

1. In refusing petition to vacate order of non pros and reinstate appeal, thereby denying petitioner his rights under the Soldiers' and Sailors' Civil Relief Act of 1940.

2. In refusing petition for reconsideration of petition to vacate order of non pros and reinstate appeal, thereby denying petitioner his rights under the Soldiers' and Sailors' Civil Relief Act of 1940.

Reasons for Granting the Writ

1. *The court below denied petitioner his rights under the Soldiers' and Sailors' Civil Relief Act of 1940.*—Section 201 of the Act provides, as applied to the instant case, that when petitioner made application to the court for continu-

ance (R. 8), the proceeding "shall" be stayed unless, in the opinion of the court, petitioner's ability to prosecute the appeal was not materially affected by reason of his military service. Therefore, the Pennsylvania Supreme Court should have continued argument on the appeal, instead of entering judgment of non pros, because there was nothing upon which it could properly have based an opinion that petitioner's ability to prosecute the appeal was not materially affected by reason of his military service. On the contrary, it affirmatively appeared that petitioner's ability to prosecute the appeal was materially affected by reason of his military service (R. 8). Nevertheless the court did not deal with this question in its decision. It simply non prossed the appeal because of non-compliance with Rule 60 (R. 3).

Under Section 200 (4) of the Act, the Petition to Vacate Order of Non Pros and Reinstate Appeal, filed within ninety days of petitioner's separation from the military service (R. 3, 9), ought to have been granted. This section also contains the following: "provided it is made to appear that the defendant has a meritorious or legal defense to the action or some part thereof." Petitioner has a meritorious and legal defense to the injunction suit (R. 9), which will be set forth in the second reason for granting the writ, which follows:

The petition for reconsideration (R. 7) was filed, *inter alia*, on the theory that the Pennsylvania Supreme Court overlooked petitioner's rights under the Soldiers' and Sailors' Civil Relief Act of 1940 when it non prossed the appeal and again when it refused the petition to vacate the order of non pros (R. 10). However, the court's refusal of the petition for reconsideration could not have been the result of an oversight. It was deliberate. It was a summary denial of petitioner's rights under the Federal law, without even dealing with the question presented. It was just an-

other manifestation of the arbitrary and apparently biased attitude the court has had toward petitioner (in connection with this matter only), which will be dealt with in the third reason for granting the writ, which follows:

2. *Petitioner has a meritorious and legal defense to the injunction suit.*—The injunction is illegal. That a court of equity has no jurisdiction to enjoin the institution of such criminal prosecutions is elementary. The leading case in the State of Pennsylvania on that question is *Meadville Park Theatre Corp.* v. *Mook*, 337 Pa. 21, 10 A. 2d 437, the Opinion of the Court having been written on January 2, 1940, by Mr. Justice Maxey.

In that case the preliminary injunction was directed to the district attorney, the county detective, the constable and the individual who lodged the information with the alderman. The Opinion of the Court referred to the important authorities on the subject, which would sustain the same decision whether the injunction issued against the district attorney or the individual who lodged the information. As a matter of fact, such an injunction against individuals in effect enjoins the district attorney and the Commonwealth, although the Commonwealth is not a party to the injunction proceedings.

Chief Justice Maxey made some very interesting observations in that most learned Opinion, pp. 23-24:

> "In appellants' brief the only question raised is whether or not the theatre corporation violated the anti-lottery laws of the Commonwealth, i. e., the Act of March 31, 1860, P. L. 382, sections 52 and 53. The much more important question as to whether the court below had the power, on this record, to restrain the district attorney from conducting a prosecution against the theatre corporation is nowhere referred to by appellants.

"Regardless of this fact, we shall discuss and decide this latter question. A part of the duty of this court is to 'keep all inferior jurisdictions within the bounds of their authority': Com. v. Ragone, 317 Pa. 113, 127, 176 A 454. That a court of equity's restraining of a district attorney in the performance of his official duty is a most unusual procedure is evidenced by the fact that this is the first time any appellate court of this state has been called upon to review such a case.

"In the equity proceedings for an injunction no attack was made on the validity of the laws which the theatre corporation was charged with violating. The complaint is that the acts the district attorney was proceeding against did not amount to a violation of the criminal laws. In other words, the corporation pleads 'not guilty' to the charges filed against it and demands that a court of equity try that issue. This a court of equity cannot do.

"A district attorney is a constitutional officer with a mandate from the state to proceed with prosecutions of violations of criminal laws. Only confusion and frustration in the enforcement of these laws would result if a person arrested or about to be arrested for their violation could by transforming himself into a complainant and a district attorney into a defendant, in civil proceedings, have his guilt or innocence adjudicated by a court of equity. The Commonwealth (as well as alleged law breakers) has an interest in the maintenance of the right of trial by jury. The machinery of the criminal law is designed for the protection of society and the office of district attorney is an important part of that machinery. It is difficult to conceive of anything more opposed to sound public policy than to permit an accused to obstruct by means of a suit in equity to which the state itself is not a party the operation in his case of the machinery of criminal procedure which has been constitutionally established to protect the public welfare."

Chief Justice Maxey made the following citation, p. 28, in that Opinion:

> "In Pennsylvania R. R. Co. v. Ewing, 241 Pa. 581, 586, 88 A. 775, this court, in an opinion by Justice Brown, said: 'Courts of equity deal only with civil and property rights, and are without jurisdiction to interfere by injunction with the administration of criminal justice.' "

Chief Justice Maxey concluded that Opinion, p. 29, as follows:

> "The Park Theatre Corporation, having been prosecuted for violation of a criminal statute, must submit to the court of quarter sessions as the exclusive tribunal for the adjudication of its guilt or innocence. A court of common pleas sitting in equity cannot take over the functions of the criminal courts. Since the court whose decree is appealed from was without power to enter it, the question whether the corporation violated the anti-lottery laws is not properly before us.
>
> "The decree is reversed at appellees' cost."

Furthermore, for a meritorious and legal defense to the injunction decree, in addition to the court's lack of jurisdiction, it is respectfully submitted that it was improper for the Court of Common Pleas of Allegheny County to have issued the injunction against your petitioner who was not a party to the proceeding but was merely an attorney representing the party.

3. *The court below was arbitrary and apparently biased.* —The circumstances, as set forth in the Statement of the Case, *supra,* under which the Pennsylvania Supreme Court repeatedly refused every application made to it by petitioner, could lead to no other conclusion. The court below cannot justify its order on legal grounds. It did not even attempt to do so. While petitioner was in the military

service and since his separation therefrom he has, in this and related proceedings, applied to the Pennsylvania Supreme Court many times for a decision on the merits of the fundamental question presented herein. The court has summarily dismissed every such application, not on the merits and without an opinion. Your petitioner has repeatedly contended that if the Pennsylvania Supreme Court does not reverse the Court of Common Pleas of Allegheny County in this case, confusion and corruption will result. There is no precedent for such an injunction decree, which interferes with the administration of criminal justice and deprives a prosecutor of the right of trial by jury. Hence this case is of public importance.

The court in the exercise of its judicial function, not arbitrary, would grant petitioner his rights not only under the Soldiers' and Sailors' Civil Relief Act of 1940, but also in the interest of equal justice under the law.

Conclusion

It is submitted that this petition for a writ of certiorari should be granted.

Respectfully,

PAUL GINSBURG,
Counsel for Petitioner.

May, 1946.